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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1913

KARL J. BRAY, pro se, and JAMES H. L. LAWLER, pro se, *Petitioners*

v.

T. W. ELISON, SHERMAN SCHOCHETT and J. M. WALTERS, individually and other persons unknown at present, *Respondents*

v.

THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, and J. M. WALTERS, Commissioner, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, and J. M. WALTERS, Commissioner, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

The petitioners, Karl J. Bray and James H. L. Lawler, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals Tenth Circuit entered in this proceeding on April 22, 1974.

OPINION OF APPELATE COURT

The opinion in this case has not been published and is in Appendix 1a. In summary, it is a refusal to hear the issues raised for lack of jurisdiction.

JURISDICTION

Jurisdiction is requested under 28 U.S.C. 1254 and/or 1255, et al, and this petition for certiorari was filed within ninety days of the date of the appelate decision entered on 22 April, 1974. The 1st Amendment to the Constitution guaranteeing petition for redress of greivances and Art. III, Section 2 of same, places this under Supreme Court jurisdiction.

QUESTIONS PRESENTED

1. Whether sovreign immunity is a bar to protect individual Federal officers and employees from suit seeking to recover damages, and to restrain further actions which violate constitutionally protected rights.

2. Whether a taxpayer can sue for refund of taxes allegedly overpaid under protest, under 28 U.S.C. 1340 and whether and how a citizen may question the constitutionality of tax collection and tax collection methods.

3. Whether the 16th Amendment to the Constitution was, in fact, properly passed and/or ratified.

4. Whether present involuntary withholding of income tax violates constitutionally protected rights of due process, involuntary servitude, privacy and stating of probable cause under oath.

5. Whether the 5th Amendment to the Constitution which prohibits taking private property for public use without just compensation also bars general taxation for socialistic purposes; e.g., where taxes are taken from one person and given to another.

6. Whether taxes in unreasonable excess of any probable tax due may be collected forcing taxpayer to sue for refund.

7. Whether the present Internal Revenue Service procedures of seizure of property or records without probable cause under oath or affirmation and without providing citizens a day in court to try to show cause why they should not be seized, are legal and how such actions may be restrained if illegal.

8. Whether the present practice implicit in Form 1040 violates the privilege against self-incrimination by forcing taxpayer to unwittingly provide information which might be used against himself.

9. Petitioners ask for instruction on proper procedure to recover damages incurred because of improper actions in the lower courts.

10. Petitioners ask how to interpose an impartial judiciary between themselves and a hostile executive branch.

CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

Constitution of the United States:

Article I, Section 8. Powers granted to Congress, specifically allowing taxation.

Article I, Section 9. "g. . . . a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Article I, Section 9. "c. No . . . ex post facto law shall be passed."

Article III, Section 2. "a. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . ." "b. . . . In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Amendment 1. "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . *and to petition the government for a redress of grievances.*" (italics added)

Amendment 4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5. "No persons shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Internal Revenue Service Code:

Section 7201. "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7202. "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7203. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7204. "In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both."

Section 7205. "Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under

section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both."

Section 7206. "Any person who -- (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 7207. "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to sections 6047(b) or (c), 6056, or 6104(d) to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

United States Code, Title 28:

Section 1331. "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Section 1340. "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

Section 1346. "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;"

Section 1361. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

United States Code, Title 26:

Section 7421. "(a) Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

Section 7422. "(f)(1) A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue) and nothwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases)."

Section 7426. "(c) For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid."

"(d) No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section."

"(e) If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States."

Public Law 204 of 1953:

"Whereas, in pursuance of an act of Congress, passed on the thirtieth day of April, one thousand eight hundred and two, entitled "An Act to enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States, and for other purposes", the people of the said territory did, on the twenty-ninth day of November, one thousand eight hundred and two, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the territory northwest of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven: Therefore, be it

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Ohio, shall be one, and is hereby defined to be one, of the United States of America, and is admitted to the Union on an equal footing with the original States in all respects whatsoever.

"This joint resolution shall take effect as of March 4, 1803. Approved August 7, 1953."

STATEMENT OF THE CASE

Petitioners alleged, inter alia, that they were being harrassed and intimidated by certain individual defendants who are Internal Revenue Service employees in an attempt to deprive petitioners of 1st Amendment rights of freedom of speech and press, and raised numerous Constitutional issues.

The District Court dismissed on the basis of lack of jurisdiction in that sovreign immunity had not been waived and the 10th Circuit Court of Appeals affirmed the dismissal and refusal to hear any issue or any facts at all. (Appendix 1a)

THE COMPLAINT

There are several issues raised in the complaint. First, was the alleged violation of 1st Amendment rights by threats, intimidation and general harrassment of certain agents of the Internal Revenue Service who were acting under color of law. Since petitioners have not been allowed discovery, they

cannot even at this time, after three years, name all of those responsible, and no issue of fact has been heard on that issue. *

There are also substantial issues of constitutional law raised which will effect present tax collection practices. These issues include possible violation of the guaranteed rights by Internal Revenue Service summonses and seizure which do not allow the person under investigation his day in court to try to show reason why such actions are illegal or privileged, i.e., the present practice of "grab and go" and the issuances, on the spot, without any oath or affirmation, of "summonses" that might violate protected rights under the 4th and 5th Amendments and which have violated these rights of petitioners.

Petitioners question the constitutionality of involuntary withholding. The petitioners note that this method of tax collection was instigated in 1942 as

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*In the past, this court has simply demanded that complaints involving First Amendment questions allege substantial and real claims. Porter v. Bennison, 180 F.2d 523 (10th Cir. 1950), cert. den. 71 S.Ct. 47, 340 U.S. 817, 95 L.Ed. 600 (1950); and Oney v. Oklahoma City, 120 F.2d 861 (10th Cir. 1941). Petitioners submit that their averments do indeed charge substantial and real claims of First Amendment infringements.

an emergency war measure and has never really been tested in the courts. Petitioners claim that withholding deprives them of property without due process; that it, as now established, seizes more than could possibly be due (thus forcing them to apply for a refund of the monies taken) without any cause and in excess of any possible tax. Further, that it imposes on petitioner a duty as employer to do involuntary servitude in that he must act as tax collector without any compensation, that it reverses the clause of the 5th Amendment which provides that private property shall not be taken for public use without just compensation and the burden of showing just compensation is a decision of fact which petitioners now question with the present waste. Petitioners cannot see where they receive any compensation at all from urban renewal for example, since they are not in those areas, nor do they receive compensation from welfare schemes that take monies from one person and give them to another.

Petitioners wish to exercise the unqualified privilege against self-incrimination in the 5th Amendment and this seems to preclude forcing petitioners to fill out Form 1040 since any information provided by them might be used against them under Internal Revenue Service Code 7201, 7202, 7203, 7204, 7205, 7206 or 7207. Petitioner Lawler has paid his tax and now sues for refund as required by 28 U.S.C. 1340 and under that section and I.R.S. Code 7422, sovereign immunity is waived, if petitioners

understand the law, so they have the right of suit which has been denied.

Finally, not as a frivilous item, but in good faith, petitioners question the ratification of the 16th Amendment. Specifically, in connection with PL 204 of 1953, he notes Ohio could not properly ratify anything and any bill or law which was passed from 1909 to 1913 is invalid since a man who was not eligible to be President sat in that office, i.e., Mr. Taft of the Ohio Territory, and this voided every act under his term.

Jurisdiction in the lower court would seem to be obtained under 28 U.S.C. 1331, 1332, 1340, 1346 and/or 1361 which pertain to various parts of the suit, as was stated by this court previously, and 28 U.S.C. 1340 with I.R.S. Code 7422 waive immunity for portions of the suit and others do not need waiver.*

THE 16TH AMENDMENT WAS NOT PASSED OR RATIFIED

One prime issue raised which dominates all others and which is an issue which can properly only be decided by

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*"A taxpayer will have standing . . . when he alleged that congressional action under the taxing and spending clause is in derogration of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." (Flast v. Cohen 392 U.S. 83 (1968))

the Supreme Court itself, is the question of the passage of the 16th Amendment. This was proposed in Congress under the administration of W. H. Taft who acted as President from 1909 to 1913. W. H. Taft was from Ohio and Ohio was one of the States that was needed to ratify the 16th Amendment. However, it is quite clear from PL 204 of 1953 admitting the State of Ohio, that Ohio was not, in 1909, a State and may not yet be a State since PL 204 clearly is an attempt to pass an ex post facto law (not just retrospective) which is also clearly prohibited by Art. I, Section 9 of the Constitution. There thus is some doubt that Ohio is yet a State even after 1953 since the ex post facto dating of admission was improper and an attempt to put face on what had been done, but there is no question but what Ohio Territories were not admitted until 1953. Thus Taft was not eligible to be President since he was resident in a Territory, not a State, and Mr. Sherman who acted as Vice-President was really President-elect, never sworn in to act in that office. The President-elect presided over Congress and acts signed by Taft were signed by a non-President, thus every act between 1909 and 1913 performed by Congress is invalid. Further, Ohio could not ratify the 16th Amendment and thus it failed of passage for lack of Ohio's vote. One or more of the various other ratifications also failed because of "stopping the clock" and the legislature going out of existance prior to action.

If this is the case, then no income tax law is valid and the entire Internal Revenue Service operation for income tax collection is invalid.

METHOD OF WITHHOLDING

Another issue raised is that of the method of withholding of tax from payroll as a means to tax collection. Petitioners have raised the issue that this method of collection if forced and involuntary is unconstitutional. The first portion of this argument is one of unreasonable seizure in violation of the 4th Amendment. The 4th Amendment guarantees that no property shall be seized save by a warrant issued by the judicial branch signed after probable cause has been stated under oath or affirmation. The element of oath or affirmation and the warrant are both missing in this tax collection method (and also in any method of seizure which allows collection without ultimately requiring probable cause under oath before an impartial judiciary). If withholding were voluntary, petitioners might wish to take advantage of this plan, but since it is forced and involuntary, it affronts their sense of right and they insist that their rights protected by the Constitution come before the desire and needs of the government for "speedy tax collection." Petitioners assert that some provision for oath or affirmation must exist and since none does exist, the method is unreasonable seizure.

The method of withholding, both for F.I.C.A. and income tax, forces the employer to do involuntary servitude as tax

collector without any compensation. This violates the 13th Amendment. Further, in the case of social security, the employer is forced to make an involuntary contribution toward his employee's F.I.C.A. The question arises if this violates his rights since private property shall not be taken for public use without just compensation. If F.I.C.A. is not for a public use, then the governmental demand for monies is clearly wrong and improper; and if it is for a public use then he himself receives no compensation at all for this in violation of the 5th Amendment.

The final portion of the argument on withholding deals with the fact that F.I.C.A. does not offer just compensation even to the employee in that he can purchase insurance to cover the same benefits as social security on the open market for roughly 60% of his contribution alone, or roughly 30% of the total contribution by employee/employer. Thus the entire F.I.C.A. violates the 5th Amendment and the contribution must be reduced to the level of "just compensation" and no more.

EXCESSIVE WITHHOLDING

Tax withholding in the case of petitioner Lawler for every year from 1970 to present has exceeded any conceivable tax due under "short form standard deduction" basis of computation, thus he has been deprived of monies (property) completely without cause, and demonstratably so. Petitioner asserts that involuntary

withholding of more than could possible be due violates the 4th and 5th and 7th Amendments flagrantly.

JUST COMPENSATION

The question is raised about just compensation for taxes raised. Petitioners feel quite strongly that the government has lost accountability to the public and has dropped into a state of immoral susceptibility to pressure groups who steal from the public (petitioners) by illegal tax and improper expenditures. Petitioners thus question expenditures and taxes for these expenditures and ask for redress of greivances in that they want to require the tax collector to show just compensation to petitioners for every dollar of tax demanded.

Specifically, petitioners object to any scheme to take monies from them by taxes and give it to someone else who provides no compensation whatsoever to petitioners. The welfare system, for example, does this; taking money from petitioners and giving it to millions of people who do nothing to benefit petitioners.

Similarly, petitioners note full public accountability of all public receipts and expenditures was wisely required by the founding fathers in the Constitution, Art. I, Section 9, paragraph 7, and that any non-public use of

taxes has long been rejected as improper. Petitioners note that all funds which are received are not publically accounted for, and thus the present system either violates right of privacy or the provision for regular statement of account of receipts is fully incompatible with these provisions. Petitioners wish to stop their contributions to gross waste and public "boondogles" and other irresponsible expenses, and such items as the C.I.A. "sluch" fund for which there is no public accountability at all.

I.R.S. CODE, FORM 1040 AND 5TH AMENDMENT

The criminal provisions of I.R.S. Code, Section 7201 through 7207, which make various forms of error a crime as applied to Form 1040 tax return and the fact that Form 1040 return is demanded by the I.R.S. violates the unqualified privilege against self-incrimination in the 5th Amendment. Petitioners state they wish to pay all taxes due, but wish to exercise the unqualified privilege against self-incrimination. The information demanded by the I.R.S. on Form 1040 when examined on an item by item basis, could be used against petitioners and thus conflicts with the privilege. Petitioners are aware that the 5th Amendment privilege is a personal one, and petitioner Lawler has somewhat "bent" in exercise of this privilege in order to demonstrate good faith and pay taxes allegedly due, so he could (under 28 U.S.C. 1340) sue for a refund and/or

tax abatement, but he now asks that the incompatible I.R.S. actions be restrained and clearly prohibited. Petitioners have been threatened and in general harrassed in an attempt to force them to provide information which they know full well will be used against them if any way can be found, particularly in that the I.R.S. seized monies over the maximum due from petitioner Lawler (double in 1973 for example) and refused refund until and unless petitioner would provide information on a tax return which could be used against him. The seizure was illegal unless probable cause was stated under oath or affirmation and some tax probably due was determined, then the keeping of same is coersion to force a possible self-incrimination and is intolerable and thus petitioners ask that Form 1040 and any similar form of the tax collection be declared unconstitutionally repressive and restrained from use.

DUE PROCESS

Petitioners wished to interpose an impartial judiciary between themselves and what they believe is a hostile executive branch bent on violating their rights. Petitioner Lawler does not, and has stated in writing he does not, wish to restrain collection of taxes * which can be shown

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*26 U.S.C. 7421 and 7422 would seem to preclude injunctive relief with respect to tax collection, but Evans v. Ross, 230 F.Supp. 795 (1964) makes it quite clear:

to possibly be due under probable cause stated under oath or affirmation, but he does wish to halt all harrassment and other activities which can be considered as possibly intimidating.

FALSE STATEMENTS BY DEFENDANTS AND PREVENTION OF PETITIONERS FROM SHOWING FULL REAL TRUTH AND DENYING DISCOVERY

So there can be no misunderstanding, and since no hearing to establish fact has yet been had, petitioners must correct the record. One individual defendant, a *special agent*, has alleged he was investigating petitioners' taxes due for 1970 year (see affidavit in record on appeal). This affidavit was entered into the record suddenly without warning in such a way that it could not be countered by petitioners, and constitutes something approaching perjury since it does not indicate the full truth and deliberately misleads the court. The petitioners note for purposes of appeal, as they understand the law, that the complaint must be presumed true (Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 32 L.Ed.2d (1972); E. L. "Bunch" Hellet, Inc. v. Universal C.I.T. Credit Corp., 259 F.2d 685 (10th Cir. 1958); and Schmidt v. United States, 179 F.2d 724

"A taxpayer, although not afforded the remedy of a declaratory judgment with regard to federal taxes, has an adequate remedy at law by paying the tax and suing for a refund."

(10th Cir. 1950), cert. den. 70 S.Ct. 1007, 339 U.S. 986, 94 L.Ed. 1388 (1950)) and the affidavits are moot and improper for showing authority, which must be done to involk sovreign immunity.

Note that the I.R.S. by introduction of a special agent, is using possible criminal charges as a real threat against petitioners and petitioner Bray has evidence that one I.R.S. agent said in front of witnesses, that they were "out to get that Karl Bray." and thus halt Bray's criticism of "Gestapo-like tactics." Petitioner Lawler, for 1970 tax year, submitted a letter return with a W-2 Form from his exclusive and sole employer stating he wished to exercise 5th Amendment privilege, and thus could not certify anything as is "required" on Form 1040 since this placed him under I.R.S. penal code 7201 through 7407, but he did also state he wished to pay "short form standard deductions", which are required by law to be computed by the I.R.S. and receive refund of the overpayment. He offered to make any return required by law, if they would only tell him precisely what was required, but that he took his letter return to fill the full letter of the law unless they told him otherwise. He received no correction to this, hence contends his letter return did fill the intent and letter of the law. The I.R.S. replied with an investigation by special agent, not informing petitioner Lawler of any alternate way to make a return without waiving 5th Amendment privileges and not informing him to this day, the real reason why he was under a criminal

investigation. The real basis of investigation can be shown to be caused by petitioner Lawler having spoken out against tyrannical I.R.S. practices and his exercise of privilege and the investigation is a violation of equal protection and harrassment in an effort to intimidate him in exercise of constitutionally protected rights since a "short form standard deduction" would normally never be selected for audit even by the I.R.S. computer nor is there really anything to investigate, past the verification of the W-2 (which petitioner has not objected to).

The special agent proceeded to demand and receive certain records, some of which may or may not have been privileged, of petitioner's employer fully establishing exclusive contract and monies paid to petitioner Lawler. He then entered the bank of petitioner Lawler, in the absence of petitioner from the state, and asked if the petitioner and numerous other persons on a "wholesale list" had accounts there. When this was answered affirmatively, with respect to petitioner Lawler, the agent filled out, on the spot, an overly broad "summons" to obtain anything and everything he could think of, including some records that are clearly privileged, (and others which are probably not privileged).

In the other bank in town, similar records were handed over without giving the people concerned the chance to a day in court. In the case of petitioner Lawler, the bank did refuse and tried to notify Lawler, but because of his absence

could not notify him until after the expiration of the summons date. In the case of petitioner Bray, the I.R.S. eventually seized the records without any hearing at all and with respect to seizure of checks paid to Bray by people purchasing his anti-I.R.S. book, *Taxation and Tyranny*, the I.R.S. stated, *in a news release*, that they were going to audit all returns of all purchasers on the basis of their purchase of Bray's book. This clearly violates freedom of the press, and is more than just a "chilling effect," and indicates the full illegal and improper intent of their actions.

The 1st Amendment proscribes governmental activities designed to surpress free speech activities. The right to freedom of speech has been characterized as "fundamental", and "vital to the maintenance of democratic institutions". Schneider v. State, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1939). It also has been expressed as "of transcendental value to all society, and not merely to those exercising their rights." Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed 2d 22 (1965). The Supreme Court has certainly affirmed the right "to engage in association for the advancement of beliefs and ideas." NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 460, 2 L.Ed.2d 488, 78 S.Ct. 1163 (1958).

It is well settled that the rights of free speech may not be circumscribed by the taxing power. Grosjean v. American

Press Co., 297 U.S. 233, 80 L.Ed. 660, 56 S.Ct. 444 (1935). In Grosjean the Supreme Court, after reviewing the history of early British and American taxing power vis-a-vis free speech and press, concluded that the state tax there involved was unlawful as violating the 1st Amendment. The Court held:

> "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." 297 U.S. at 250.

The Supreme Court has had other occasions to consider the power of state governments to limit speech activities by the taxing power. In Speiser v. Randall, 357 U.S. 513, 2 L.Ed. 2d 1460, 78 S.Ct. 1332 (1958) the Court flatly stated, "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." 357 U.S. at 519. The court held that such a denial would violate the 1st Amendment as if "the State were to fine them for this speech." Ibid.

Petitioners thus do not object to investigation by the I.R.S. per se, but to intimidation and to unequal treatment on an illegal basis. They wish to have their day in court in keeping with the

decision of Reisman v. Caplan, 375 U.S. 440, and other numerous Supreme Court decisions including Donaldson v. United States, 400 U.S. 517, (1971), United States v. Newman, 441 F.2d 165 (5th Cir., 1971), Harris v. United States, 413 F.2d 316 (9th Cir. 1969). The Supreme Court clearly held plaintiff could intervene and if he could show "significant protectable interest" or "substantial deficiencies" the records may not be had. (Also see briefs in record on appeal, pp. 31 to 39 and 14 to 22.) Thus petitioners maintain that they are entitled to a hearing and that the lower courts erred in that they are entitled to judicial intervention against illegal activities.

To clearly show the illegal nature of the I.R.S. summons, they have asked for records which do not exist and never existed and which would be privileged if they did exist. They have misused investigations extensively and compiled extensive "dossiers" on petitioners on the basis of their exercise of free speech criticizing the I.R.S. For example, miscellaneous agents demanded and received tape recordings of several anti-I.R.S. radio broadcasts and intimidated Mr. Bray's employer in such a way he was fired from his job on Station KSXX in Salt Lake City. The question arises how criticism of the I.R.S. tactics can be part of a legitiment tax collection investigation and why they would go to great lengths to intimidate employers of petitioner. (Petitioner Bray's income

in 1970 was less than $600.00 thus he did not have to file a return.) Petitioner Lawler has been forced to seek employment in South Carolina at least in part because of I.R.S. and Utah State tax harrassment.

Petitioners also intend to show illegal opening of mail, phone taps and other actions which are criminal in nature.

The above clearly shows why petitioners believe their 1st Amendment rights have been violated, and believe they are entitled to a day in court to try to show that individual defendants, many of whom are not known yet because the petitioners have been denied discovery process, conspired to exceed any reasonable tax collecting authority and conspired to oppress, to intimidate and to harrass petitioners under color of law and to deprive petitioners of 1st, 4th and 5th Amendment and other rights, and, in short, have instituted a form of tyranny with the complacency of the United States Attorney and the Department of Justice.

Petitioners asked court protection to halt illegal and improper actions and had the lower court acted with proper speed, petitioner Lawler would probably not have been forced to leave Utah and find employment in areas remote from Utah, i.e., South Carolina, where he now resides. Thus, petitioners ask this court to spell out precisely how others may obtain protection in the future, and avoid continuation of illegal actions. Petitioners also ask for precise binding detailed statement of restrictions on executive summons so as

to halt misuse of same, since this power has been delegated to an absurd number of special agents, grossly in excess of the intent of Congress to allow the commissioner or his delegates to issue summons. This has resulted in wide-spread misuse of this power since it was originally only designated to Congressionally approved appointees, i.e., the tax commissioner himself, and now is exercised, in lieu of warrants, to circumvent the 4th and 5th Amendments.

> "The subpoena power 'is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer . . . True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued, it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation.' Cudahy Packing Co., Ltd. v. Holland, 315 U.S. 357, 363-364." United States v. Minkler, 350 U.S. 179, 187.

As a related issue, petitioners pray for precise circumscription of seizure of property for tax, particularly by the use

of executive tax seizure procedures which also evade or avoid the 4th and 5th Amendment requirement for judicial warrant *under oath or affirmation*, and which have the effect of depriving persons of property without trial or due process, since this is exactly the sort of greivance specified in the Declaration of Independance which also is detailed in the Federalist Papers, and which now is unleased in full greivious force upon a defenseless public. Remembering the government is to be controlled by the people and to serve the people, not that the people should be servants or slaves to any part of the government, petitioners ask that the judicial branch protect individual rights and halt the tyranny which now exists in the executive branch of the government, Internal Revenue Service income tax collection branch.

IMPROPER ACTIONS IN LOWER COURT

The lawyers for the United States have repeatedly muddled the real issues and in general have performed actions which are not proper, and in particular the petitioners ask how they may recover damages from these persons, particularly for preparation of a faulty document, having it issued over the written protest of the petitioners that it was faulty, and the petitioners did not want it issued in their name, and further that after it was issued, the petitioners asked that it be dismissed, yet the lawyers appealed and obtained a stay pending appeal of the very faulty instrument they prepared themselves (Gregson v. I.R.S., 478 F.2d 237. They

violated the rules of procedure in the issuance of a document (see record on appeal, page 10) to reset a hearing without adequate notice, causing petitioners one unnecessary trip to court (see record on appeal page 23 and 25 which move for damages by their illegal actions) and Mr. Dowd misrepresented to the court that restraint would halt all I.R.S. activities when restraint clearly pertained only to petitioners.

SUMMARY

The Supreme Court has made repeated assertions that the taxpayer has the right to his day in court on condition of prepayment of taxes, yet petitioners have lived up to those conditions and find their right to a day in court still denied. The Supreme Court has repeatedly said that persons do have a right to intervene in summons proceedings to show some protectable interest, yet petitioners find they are denied that right and have not been allowed a day in court. The United States Constitution itself guarantees to all citizens the right to petition for redress of greivances, yet petitioners have been denied the right to have their petition heard. The Supreme Court referred petitioner to the lower court in letter of 21 July, 1972 stating that the lower court had original jurisdiction since the provisions of Art. III, Section 2 do not provide for original *exclusive* jurisdiction but the lower court has refused to honor this referral and thus petitioners find themselves totally without the guaranteed right to petition for redress of

greivances. The lower court has prejudged the case and assumed that the individual defendants were acting within their authority, and has erred in that in no respect can a restriction of 1st Amendment rights be within any constitutional law. There is an error of law in that jurisdiction to sue a person who has violated a constitutionally protected right is already given, and sovreign immunity is not an issue. There is an error of fact implicit in assuming that a case against individual defendants is a case against the United States. When attempting to raise sovreign immunity as a bar to a suit, an individual defendant, who is a United States employee must show his authority for the action as part of a hearing of fact *prior* to raising the bar of sovreign immunity. The constitutional issues raised with the United States as defendant, are also allowed under other provisions. These issues are of such import that they can be decided only by the Supreme Court.

Petitioners request the determination of all issues raised since this has reached the Supreme Court in the normal course of appeal.

Respectfully submitted,

James H. L. Lawler
108 Owens Circle
Summerville, S.C., 29483
Attorney pro se

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1689

(Decided April 22, 1974)

KARL J. BRAY, pro se, and JAMES H. L. LAWLER, pro se, IN CLASS ACTION,

v.

T. W. ELISON, SHERMAN SCHOCHETT and J. M. WALTERS, individually and other persons unknown at present,

v.

THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE and J. M. WALTERS, Commissioner.

Stephen W. Cook, attorney of record for plaintiffs.

David English Carmack (*Scott P. Crampton*, Assistant Attorney General; *Meyer Rothwacks*, *John P. Burke*, and *Richard Farber*, for defendants.

Before HILL and DOYLE, *U. S. Circuit Judges*, and Hon. JAMES R. DURFEE, U. S. Court of Claims, sitting by designation, *Judges*.

PER CURIAM.

Karl Bray and James Lawler appeal from an order of the United States District Court for the District of Utah, dismissing their action against the Internal Revenue Service (IRS) for lack of jurisdiction.

The complaint alleges, inter alia, that appellants had publicly spoken out against the IRS and that because of such criticism they were being harassed and intimidated by an IRS investigation in an attempt to deprive them of their First Amendment right of freedom of speech. The IRS moved to dismiss on the ground, inter alia, that sovereign immunity had not been waived. The district court granted the motion, and we affirm.

The United States, as sovereign, may not be sued without its consent and the terms of such consent given must define the court's jurisdiction. Buck v. United States, 466 F.2d 481 (10th Cir. 1972). Appellants' complaint relies on Section 2, Article III of the United States Constitution * and 28 U.S.C. Sec. 1340, ** to

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*Section 2 provides in part: "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party; . . ."

**U.S.C. Sec. 1340 provided: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress

establish such consent and jurisdiction. That reliance, however, is misplaced. Section 2 of Article III does not invest district courts with across-the-board jurisdiction as to all cases in which the United States is a party. They do have jurisdiction in enumerated cases, but it takes an Act of Congress to confer it. Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972), *cert. denied*, 410 U.S. 910.

Nor does 28 U.S.C. Sec. 1340 provide jurisdiction. It is not a waiver by the government of immunity from suit, but presupposes a waiver of immunity under some other provision. *See, e.g.*, Darling v. United States, 352 F.Supp. 565 (E.D. Calif. 1972); Broadwell v. United States, 234 F.Supp. 17 (E.D.N.C. 1964), *aff'd per curiam* 343 F.2d 470 (4th Cir. 1965).

Appellants now argue that jurisdiction for their suit exists by virtue of 28 U.S.C., Sec. 1346(a)(2). *** This

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providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

*** 28 U.S.C. Sec. 1346(a)(2) provides in part: "(a) The district courts shall have original jurisdiction concurrent with the Court of Claims, of: . . . "(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

provision, however, represents only a limited concession by the government to be sued. It is available only to those who seek money damages, and not where declaratory, injunctive or other equitable relief is sought, as it is here. National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973); Blaze v. Moon, 316 F.Supp. 495 (S.D.Texas 1970), *aff'd per curiam* 440 F.2d 1348 (5th Cir. 1971).

Finally, appellants look to 28 U.S.C. Sections 2201 and 2202 **** for jurisdiction. Again, these statutes do not create jurisdiction, they merely provide an additional remedy where the district court already has jurisdiction to entertain the suit. Barr v. United States, 478 F.2d 1152 (10th Cir. 1973).

**** 28 U.S.C. Sec. 2201 provides: "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. Sec. 2202 provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

We find that appellants have no jurisdictional basis for their action. Accordingly, the district court's order dismissing the action is AFFIRMED.